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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JUAN FRANCISCO VENEGAS,

Petitioner,

VS.

MICHAEL R. MITCHELL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE SAPERSTEIN & SELIGMAN, CALIFORNIA TRIAL LAWYERS ASSOCIATION, CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION, PLAINTIFFS EMPLOYMENT LAWYERS ASSOCIATION, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, EQUAL RIGHTS ADVOCATES, CENTER FOR LAW IN THE PUBLIC INTEREST AND PUBLIC ADVOCATES, INC.

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QUESTION PRESENTED

Did Congress, in enacting the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, intend to add recovery of statutory fees to the already existing system of fee agreements without abrogating enforceable written contracts?

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. FEE AGREEMENTS ARE ESSENTIAL INDUCEMENTS TO THE PROSECUTION OF CIVIL RIGHTS CASES	7
A. The Fee Agreement Is and Has Always Been a Critical Inducement to Accepting Representation of Clients With Meritorious Claims Who Cannot Afford to Hire Lawyers	7
B. Issues Regarding Regulation of the Terms of Fee Agreements Should Be Left to the Extensive Fee Regulatory System	9
C. The Invalidation of All Fee Contracts Would be an Unwarranted Affront to the Right to Contract	11
II. ENFORCEMENT OF OTHERWISE PERMISSIBLE FEE CONTRACTS IS CONSISTENT WITH CONGRESS' LANGUAGE AND INTENT	14
A. The Plain Language of the Statute as Well as the Legislative History Clearly Demonstrate that Congress Did Not Intend to Void the Right to Contract	14
B. Enforcement of Respondent's Fee Agreement Is Consistent with Prior Supreme Court Rulings	17
III. EXPERIENCE UNDER SECTION 1988 COUNSELS AGAINST INVALIDATING FEE CONTRACTS	19
CONCLUSION	22

TABLE OF AUTHORITIES

CASES	Page
Agarwal v. Johnson, 25 Cal.3d 932 (1979)	10
Alcorn v. Anbro Engineering, Inc., 2 Cal.3d 493 (1970)	10
Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975)	16
American Tobacco Co. v. Patterson, 456 U.S. 63 (1982)	14
Blanchard v. Bergeron, ___ U.S. ___, 109 S.Ct. 939 (1989)	18, 19
Blum v. Stenson, 465 U.S. 886 (1984)	7, 17
Caminetti v. U.S., 242 U.S. 470 (1917)	14
Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978)	12
City of Riverside v. Rivera, 477 U.S. 561 (1986)	10
Crawford Fitting Co. v. J. T. Gibbons, 482 U.S. 437 (1987)	15, 18
Evans v. Jeff D., 475 U.S. 717 (1986)	8, 16, 19
Farmington Dowel Products Co. v. Foster Mfg. Co., 421 F.2d 61 (1st Cir. 1969)	7, 11
Hensley v. Eckerhart, 461 U.S. 424 (1983)	7
INS v. Cardoza-Fonseca, 480 U.S. 421 (1986)	14
Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974)	16
Kelly v. Robinson, 479 U.S. 36 (1986)	14
Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976)	7
Lockheed Minority Solidarity Coalition v. Lockheed Missiles & Space Co., 406 F. Supp. 828 (N.D. Cal. 1976)	22
Manhart v. City of Los Angeles, 652 F.2d 904 (9th Cir.), *vacated and remanded on other grounds*, 461 U.S. 951 (1983)	7
Oki America, Inc. v. Microtech International, Inc., 872 F.2d 312 (9th Cir. 1989)	13

	Page
Pennsylvania v. Delaware Valley Citizens Council for Clean Air, 478 U.S. 556 (1986)	11
Pennsylvania v. Delaware Valley Citizens Council for Clean Air, 483 U.S. 711 (1987)	18
Stanford Daily v. Zurcher, 64 F.R.D. 680 (N.D. Cal. 1974)	17
Swann v. Charlotte-Mecklenburg Bd. of Education, 66 F.R.D. 483 (W.D.N.C. 1975)	17
United States v. Hohri, 482 U.S. 64 (1987)	14
Wards Cove Packing Co. v. Atonio, ____ U.S. ____, 109 S.Ct. 2115 (1989)	20
STATUTES AND REGULATIONS	
15 U.S.C. § 15g(1) (A) (b)	15
28 U.S.C. § 1821	15
28 U.S.C. § 2412(d) (1) (A)	15, 17
ABA Code of Professional Responsibility DR 1-106 (1981)	9
ABA Informal Opinion 86-1521	11
ABA Model Rules of Professional Conduct Rule 1.5 (1983)	9
American-Mexican Chamizal Convention Act of 1964, 22 U.S.C. § 277d-21	15, 16
Antitrust Civil Process Act Amendments Pub. L. 94-435, 90 Stat. 1394 (1976) 15 U.S.C. §§ 15b-h.	15
Cal. Civil Code § 51	10
Cal. Const., Art. I	13
Cal. Govt. Code § 12940	10
California Business & Professions Code § 6200, *et seq.*	9
California Business and Professions Code § 6000, *et seq.*	9
California State Bar Rules of Professional Responsibility	9
Civil Rights Attorney's Fees Awards Act Pub. L. 94-559, 90 Stat. 2641, 42 U.S.C. § 1988	*passim*
Coast Guard Act 14, U.S.C. § 431(c)	15

	Page
Const., Art. I § 10	13
Federal Tort Claims Act, 28 U.S.C. § 2678	15, 17
International Claims Settlement Act of 1949, 22 U.S.C. §§ 1623(f), 1631(j), 1641(p), 1642(m), 1643(k)	15
Japanese-American Evacuation Claims Act of 1948, 50 U.S.C. App. § 1985	16
Military Personnel and Civilian Employees Claims Act of 1964 *as amended*, 31 U.S.C. § 3721(i)	16
Organic Act of Guam, 48 U.S.C. § 1424	16
Servicemen's Group Life Insurance Act, 38 U.S.C. § 784(g)	16
Social Security Act, 42 U.S.C. § 406(a)	15,17
OTHER AUTHORITIES	
3 C. D. Sands Sutherland Statutory Construction § 46.01 (4th Ed. 1986)	14
Administrative Office of the United States Courts 1984 Annual Report of the Director	20
Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641 (1987)	20, 21
Mandatory Arbitration of Attorney-Client Fee Disputes: A Concept Whose Time Has Come, 14 Toledo L. Rev. 1205 (1983)	9,10
Schwab & Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of The Attorneys Fee Statute and the Government as Defendant*, 73 Cornell L. Rev. 719 (1988)	8, 21

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INTEREST OF AMICI CURIAE

Amici curiae represent an array of private civil rights attorneys and trial lawyers' organizations who depend on fee agreements in their representation of civil rights, environmental, and public interest plaintiffs. Amici also represent numerous non-profit civil rights and public interest organizations which are actively involved in civil rights cases.

The amici are:

SAPERSTEIN & SELIGMAN, P.C., Oakland, California

This seventeen-year-old, 32-lawyer firm specializes in plaintiffs' employment discrimination litigation, both individual and class actions. Contingent fee agreements are commonly chosen by clients because civil rights victims typically cannot afford any other type of fee arrangement. Frequently, the client is not obligated to pay for either costs or legal services during the course of the litigation.

A contingent fee agreement which entitles the firm to a percentage of the recovery is an important incentive for undertaking the risk of representing civil rights plaintiffs. Prohibiting the firm from entering into contingent fee agreements would seriously deter them from representing civil rights plaintiffs.

CALIFORNIA TRIAL LAWYERS ASSOCIATION

The California Trial Lawyers Association (CTLA) is a statewide organization of plaintiffs' trial attorneys. CTLA's approximately 6,500 members derive legal fees from contingent fee work and have represented hundreds of civil rights plaintiffs on contingent fee contracts. If CTLA's members were prohibited from entering into contingency fee agreements, many would simply not handle civil rights cases.

CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION

The California Employment Lawyers Association is a statewide organization of plaintiffs' attorneys who practice employment and discrimination law. Members of this organization are involved in employment and civil rights cases and commonly accept representation of plaintiffs on a contingent fee basis. Currently, there are a small number of attorneys left in California willing and capable of prosecuting employment

discrimination cases on behalf of plaintiffs. This figure would dwindle to almost nothing if employment attorneys were prohibited from contracting with their clients on a contingency basis for a percentage of the recovery.

PLAINTIFFS EMPLOYMENT LAWYERS ASSOCIATION

The Plaintiffs Employment Lawyers Association (PELA) is a nationwide organization of plaintiffs employment attorneys. Members of PELA are involved in employment, civil rights and public interest litigation and rely on contingent fee agreements to pursue these cases. If statutory fees were the only fee recovery in civil rights cases, many of PELA's members would be out of the business of prosecuting civil rights claims.

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

The Mexican American Legal Defense and Educational Fund (MALDEF) is a national civil rights organization established in 1967. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics living in the United States. This objective is pursued in part by MALDEF's provision of free legal representation to civil rights plaintiffs in nonmonetary cases. MALDEF recognizes, however, that the rights of Hispanics are also vindicated in cases involving potentially sizeable monetary recovery by private counsel retained on a contractual basis. Both types of representation are essential to securing the civil rights of Hispanics.

AMERICAN CIVIL LIBERTIES UNION FOUNDATION,
New York, New York
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF SOUTHERN CALIFORNIA
Los Angeles, California

The American Civil Liberties Union ("ACLU") is a non-profit public interest organization with more than 275,000 members and more than 50 affiliates in nearly every state, including the ACLU of Southern California ("ACLU/SC"). Both the ACLU and its affiliates are dedicated to protecting the civil rights and civil liberties of all persons in the United States. The ACLU, through its legal staff and hundreds of volunteer attorneys, has been involved in hundreds of cases brought under the federal civil rights laws to vindicate these rights.

Though the ACLU does not sponsor cases on a contingent fee basis it has a strong interest in maintaining the availability of attorneys fee awards to private counsel involved in bringing civil rights actions. To the extent that the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. Section 1988, is interpreted in a way that creates disincentives for the private bar to handle civil rights cases, the ACLU believes that the purposes of the civil rights laws will be undermined and many deserving civil rights plaintiffs will remain unrepresented.

EQUAL RIGHTS ADVOCATES, INC.,
San Francisco, California

Equal Rights Advocates, Inc. (ERA) is a non-profit public interest law firm dedicated to achieving equality of rights under the law for women. ERA regularly handles intake and referral of sex discrimination matters, and has great difficulty finding attorneys willing to represent clients who cannot afford legal counsel.

CENTER FOR LAW IN THE PUBLIC INTEREST,
Los Angeles, California

The Center for Law in the Public Interest (CLIPI) is a non-profit public interest law firm. CLIPI's public interest litigation includes employment discrimination and environmental cases. The Center regularly handles intake and referral of civil rights, environmental and public interest litigation. Such cases are virtually impossible to refer to private counsel where the client cannot afford the cost of legal services.

PUBLIC ADVOCATES, INC., San Francisco, California.

Public Advocates, Inc. is a non-profit public interest law organization which has been representing poor and minority individuals and organizations since 1971. The bulk of Public Advocates' litigation is in the fields of education, health care, homelessness, economic development and employment. Many, if not most of Public Advocates' cases are co-counseled with private attorneys and legal services organizations. The availability of co-counseling arrangements with private attorneys would be impaired by a prohibition against private fee contracts.

SUMMARY OF ARGUMENT

The amici submitting this brief are private practitioners and non-profit public interest and civil rights organizations that are litigating hundreds of cases under fee shifting statutes. Unless privately negotiated fee agreements are available, the congressional goal of enabling clients to find competent lawyers needed to enforce civil rights and environmental legislation will be frustrated. The already severely diminishing number of attorneys willing to handle such cases would decrease even further if the Court were to take away one of the traditional means for attorneys to undertake representation for clients who cannot afford legal services—the contingent fee contract.

Fee contracts are subject to regulation under state and federal statutes and are even further regulated by state, local and American Bar Association ethical rules and regulations which in this case includes the Rules of Professional Conduct of the State Bar of California. Usurpation of this extensive fee regulation system was not contemplated by Congress when it enacted the civil rights fee shifting provisions.

As there is no indication that Congress intended to eliminate the contract rights of attorney and client, the decision of the Ninth Circuit should be affirmed.

ARGUMENT

I.

FEE AGREEMENTS ARE ESSENTIAL INDUCEMENTS TO THE PROSECUTION OF CIVIL RIGHTS CASES

A. The Fee Agreement Is and Has Always Been a Critical Inducement to Accepting Representation of Clients With Meritorious Claims Who Cannot Afford to Hire Lawyers

Enforcement of privately negotiated fee agreements which permit the attorney to recover a percentage of the damages is consistent with the aim of the fee shifting statutes, which seek to provide an incentive for attorneys to represent clients with meritorious civil rights and environmental claims. This fundamental congressional purpose has been repeatedly recognized by this Court.[1]

The importance of the fee agreement as an inducement is demonstrated by its consistent use in the legal market place in civil rights and comparable complex federal litigation.[2] Unlike civil rights defendants, civil rights plaintiffs often lack the resources to pay for representation during the course of litigation. Indeed, clients represented by *amici* frequently

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[1] *See Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) ("The purpose of § 1988 is to ensure 'effective access to the judicial process' for persons with civil rights grievances. H.R. Rep. No. 94-1558, p. 1 (1976)."); *Blum v. Stenson*, 465 U.S. 886, 897 (1984) ("The legislative history [of § 1988] explains that 'a reasonable attorney's fee' is one that is 'adequate to attract competent counsel, but . . . [that does] not produce windfalls to attorneys.' S. Rep. No. 94-1011, p. 6 (1976).").

[2] *See, e.g., Manhart v. City of Los Angeles*, 652 F.2d 904 (9th Cir.), *vacated and remanded on other grounds*, 461 U.S. 951 (1983); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 1021 (3d Cir. 1976) (antitrust case); *Farmington Dowel Products Co. v. Foster Mfg. Co.*, 421 F.2d 61 (1st Cir. 1969) ("*Farmington I*").

cannot even afford to pay for the non-fee costs of litigation. Therefore, private civil rights plaintiffs' counsel may have no realistic alternative but to enter into fee arrangements in order to meet the costs of running their practices.

Evans v. Jeff D., 475 U.S. 717 (1986) has made the practical need for fee agreements in cases involving fee shifting statutes even greater. In *Evans*, this Court held that plaintiffs in a civil rights action could waive the right to statutory attorneys' fees. Given the possibility that the client may waive statutory attorney's fees altogether, separate fee contracts between plaintiffs and their counsel have become essential. In an *Evans* situation, the only protection available for private attorneys is to have in effect a fee agreement. If such agreements are not available in fee shifting cases, the threat of forced fee waivers under *Evans* would make civil rights cases financially devastating for plaintiffs' attorneys. Not only would such cases not be financially competitive with other cases, they would lead to financial ruin for even the most successful of plaintiffs' firms.

Failure to enforce ethically permissible fee agreements will undermine the economic viability of the sole practitioners and small firms that make up the bulk of the experienced private civil rights bar, and will inevitably lead to the withdrawal of many of the most experienced and talented attorneys from this practice.[3] Thus, invalidation of privately negotiated fee contracts would be a serious, and perhaps devastating, setback to the enforcement of the civil rights and environmental laws. The only beneficiaries of such a financial disincentive would be the violators of those laws.

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[3] Contrary to Petitioner's assertion at page 28 of his brief, most civil rights litigation is brought by small private firms and solo practitioners. *See* Schwab & Eisenberg, *Explaining Constitutional Tort Litigation*, 73 Cornell L. Rev. 719,768 (1988).

B. Issues Regarding Regulation of the Terms of Fee Agreements Should Be Left to the Extensive Fee Regulatory System

Many of the issues raised by Petitioner involve fact specific matters of contract interpretation and ethical principles that are best left to the extensive enforcement mechanisms already in place among local, state and national bar associations, state regulatory provisions, and fee arbitration panels which routinely regulate attorney-client fee disputes. In this case, this includes the ABA Model Rules of Professional Conduct, Rule 1.5 ("Fees") (1983), the ABA Code of Professional Responsibility DR 1-106 ("Fees for Legal Services") (1981), as well as various provisions of the California Business and Professions Code, § 6000, *et. seq.*, and the California State Bar Rules of Professional Responsibility. In addition, numerous local agencies such as state and county bar associations have fee arbitration panels which routinely consider questions regarding the enforcement of fee agreements.[4]

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[4] *See Mandatory Arbitration of Attorney-Client Fee Disputes: A Concept Whose Time Has Come*, 14 Toledo L. Rev. 1205 (1983). These fee arbitration agencies include: Alaska Bar R. 35-42; Rules of Comm. of the State Bar of Ariz. on Arbitration of Fee Disputes; By-Laws of the Legal Fee Arbitration Comm. of the Bar Ass'n of Greater Cleveland and the Rules and Regulations of its Legal Fee Arbitration Bd.; Rules for Arbitration for Legal Disputes, Conn. Bar Ass'n; Rules of the Fee Dispute Comm. of the Dallas Bar Ass'n; Model Fee Arbitration Bylaws, as adopted by the Fla. Bar Ass'n; State Bar of Ga.'s Fee Arbitration R.; Rules of the Idaho State Bar on Arbitration of Fee Disputes; Rules for the Arbitration Comm., as approved by the Iowa State Bar; Mich. Gen. CT.R.979; Legal Fee Arbitration Plan, as adopted by the Ky. Bar Ass'n; Resolution of Fee Disputes, N.H. Bar Ass'n; N.J.Ct.R. 1:20A; Section 739, By-Laws of the Philadelphia Bar Ass'n Rules to the Fee Dispute Comm. of the Philadelphia Bar Ass'n; Procedures of the Legal Fee Arbitration Bd. of the Minn. State Bar; Rules of the Comm. on Resolution of Fee Disputes, the Bar Ass'n of Metropolitan St. Louis; Fee Arbitration Rules, as adopted by the State Bar of Wis.; Cal. Bus. & Prof. Code § 6200, *et seq.*; Rules of Procedures for the

Reference to state and local fee regulation is not only prudent, but will frequently be necessary in civil rights and other fee shifting cases due to the common existence of pendent state claims. Thus, fee agreements in fee shifting cases frequently apply to both federal and state law claims. For example, in *City of Riverside v. Rivera*, 477 U.S. 561 (1986), plaintiffs prevailed on both their federal claims and their state law negligence claims. *Id.* at 564. Had plaintiffs' counsel wished to enforce a fee contract in that case, the Tenth Amendment would require that the fee contract based on the state law tort causes of action be governed and enforced in accordance with state law.

The same is true of discrimination cases in California, where the state legislature has enacted state statutes prohibiting discrimination in employment, housing and public accommodations and services. *See* Cal. Govt. Code § 12940, *et. seq.;* Cal. Civil Code § 51. Other pendent state claims are often included in federal civil rights cases in California, including intentional infliction of emotional distress predicated on a discrimination theory.[5] In these cases involving both federal and state discrimination causes of action, the California courts would have the right to determine and regulate the attorneys' fees contract questions in accordance with local and state bar professional rules of responsibility, *(footnote 4 continued from page 9)*

Hearing of Fee Arbitration Proceedings by the Alameda County Bar Ass'n; Rules for Arbitration Proceedings for Attorney Fee Disputes, Beverly Hills Bar Ass'n; Rules for Conduct of Fee Disputes and Other Related Matters, Los Angeles County Bar Ass'n; Rules of Conduct of Fee Arbitrations by the Fee Arbitration Comm. of the Santa Clara County Bar Ass'n; San Diego County Bar Ass'n Rules of the Arbitration Comm. *Id.* at 1226 n.104.

[5] *See, e.g., Agarwal v. Johnson*, 25 Cal.3d 932 (1979) (intentional infliction of emotional distress based on racial epithets); *Alcorn v. Anbro Engineering, Inc.*, 2 Cal. 3d 493 (1970) (supervisor shouting epithets to plaintiff).

California contract law, and the fee contract provisions of the California Business & Professions Code.

C. The Invalidation of All Fee Contracts Would be an Unwarranted Affront to the Right to Contract

The result sought by Petitioner would invalidate fee agreements under a number of statutes and would not be limited to interfering with the right to contract only in civil rights cases. This Court and Congress have stated that fee shifting statutes are to be interpreted "*in pari materia*".[6] Thus, contracts regarding environmental, civil rights, and other fee shifting statutes are subject to invalidation regardless of whether or not the client is willing to abide by the terms of the contract, as was the case in *Farmington Dowel Products Co. v. Foster Mfg. Co.*, 421 F.2d 61 (1st Cir. 1969).[7]

Since the statutory fee is only awarded if the client wins, and no statutory fee is awarded if the client loses, the radical result sought by Petitioner—an order prohibiting the attorney in this and consequently any fee shifting case from collecting a fee except the statutory fee—imposes on the attorney and client a forced contingent arrangement. The result of this forced bargain would be that the right to contract for even a standard hourly agreement is abrogated.[8] Attorney and client

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[6] *See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 556, 559 (1986) ("*Delaware Valley I*"); S. Rep. No. 94-1011, 94th Cong., 2d Sess., 6 (1976).

[7] *Farmington* is considered the leading case on the relationship between the statutory and ethical tests which govern fee amounts. In *Farmington*, an antitrust case, the Court held that the statutory and ethical tests for a reasonable fee were different. 421 F.2d at 90. It instructed the district court to determine the "maximum ethically allowable fee," to assess the reasonable statutory fee from defendant, and to require plaintiff to pay only such further amount as would constitute a fee that was not excessive under the ethical standards. *Id.* at 87.

[8] This result raises serious ethical concerns. In 1986 the American Bar Association Standing Committee on Ethics and Professional Responsibility issued Informal Opinion 86-1521, stating that it is unethical for a lawyer not to offer clients alternative fee arrangements before accepting a case on a contingent-fee basis.

should be encouraged—not prohibited from—negotiating fee contracts which best suit the needs and financial circumstances of each case.

Invalidation of fee contracts also unnecessarily interferes with economic regulation which occurs in the legal marketplace. If statutory fees alone were sufficient to attract an adequate supply of attorneys, then these types of agreements would dominate the marketplace. If, however, statutory fees were insufficient consideration, civil rights plaintiffs will have to have some "bargaining chip" to induce attorneys to accept their cases. Traditional bargaining tools which clients can utilize to obtain counsel include contemporaneous hourly agreements, lump sum "retainer" agreements, and contingent fee agreements.

The ruling sought by Petitioner would also interfere with all fee contracts negotiated between civil rights *defendants* and their counsel. This Court has recognized that the civil rights statutes, like "many of the statutes", have "flexible" fee provisions which authorize "the award of attorney's fees to either plaintiffs or defendants". *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 416 (1978).[9] Since either plaintiff or defendant may be a "prevailing party" within the meaning of the civil rights fee statutes, limiting fees to those available under a statutory award would invalidate a broad array of plaintiffs' and defendants' free market contracts. Surely, Congress never intended such interference with the rights of parties to negotiate free market contracts regarding payment for legal representation.

Thus, to interpret the Civil Rights Attorney's Fees Awards Act as precluding private fee agreements between clients and their attorneys would be a substantial burden on those parties' right to enter contracts. In interpreting such

[9] The *Christianburg* standard, although decided under Title VII's fee provision, applies to numerous fee statutes. *See Christianburg*, 434 U.S. at 416 n.7.

legislation the importance of the individual's right freely to enter into contracts should not be overlooked. The importance of the right to contract is underscored by the contract clauses of the Federal and State Constitutions.[10]

While courts and legislatures alike have been more willing to substitute their own judgment of what is a sound and worthwhile business transaction for the judgments of private individuals in the marketplace, this is not appropriate here. As Judge Alex Kozinski stated in a recent opinion:

> Perhaps most troubling, the willingness of courts to subordinate voluntary contractual arrangments to their own sense of public policy and proper business decorum deprives individuals of an important measure of freedom. The right to enter into contracts—to adjust one's legal relationships by mutual agreement with other free individuals—was unknown through much of history and is unknown even today in many parts of the world. Like other aspects of personal autonomy, it is too easily smothered by government officials eager to tell us what's best for us. The recent tendency of judges to insinuate tort causes of action into relationships traditionally governed by contract is just such overreaching. It must be viewed with no less suspicion because the government officials in question happen to wear robes.
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> *Oki America, Inc. v. Microtech International, Inc.*
> 872 F.2d 312, 316 (9th Cir. 1989)
> (Kozinski, J., concurring)

Judge Kozinski's remarks regarding the expansion of tort causes of action into the contract area applies with even greater force to the proposed interpretation of the Civil Rights Attorney's Fees Awards Act. For, if the Court interprets that Act as Petitioner suggests, it will obliterate the free market rights of the parties and their attorneys to enter into private contracts and will place the entire matter of what consider-

[10] Const., Art. I § 10; *see, e.g.*, Cal. Const., Art. I.

ation attorneys will be paid for representing such clients—normally the subject of free negotiation between client and attorney—into the hands of the judiciary. This affront to contract rights should not be lightly embraced by this Court.

II.

ENFORCEMENT OF OTHERWISE PERMISSIBLE FEE CONTRACTS IS CONSISTENT WITH CONGRESS' LANGUAGE AND INTENT

A. The Plain Language of the Statute as Well as the Legislative History Clearly Demonstrate that Congress Did Not Intend to Void the Right to Contract

Petitioner has postulated that the legislative history of the Civil Rights Attorney's Fees Awards Act of 1976[11] supports the abrogation of the right of attorney and client to agree to the terms of an ethically permissible fee contract. To the contrary, the clear language of the statute, as well as its legislative history, belie this view.

It is a fundamental rule of statutory construction that "the meaning of the statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917). If the language is unambiguous, it is inappropriate to resort to legislative history to interpret the statute. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 431-32 (1986); *Kelly v. Robinson*, 479 U.S. 36, 43 (1986); *United States v. Hohri*, 482 U.S. 64 (1987); 3 C.D. Sands, *Sutherland Statutory Construction*, § 46.01 (4th Ed. 1986).

[11] The Civil Rights Attorney's Fees Awards Act, Pub. L. 94-559, 90 Stat. 2641, as set forth in 42 U.S.C. § 1988.

Just weeks before Section 1988 was enacted, Congress passed the Antitrust Civil Process Act amendments of 1976.[12] During the course of the lengthy debates on the antitrust amendments, the legislators focused considerable attention on the availability of contingent fees for private attorneys. As a consequence, both the House and Senate ultimately agreed to explicitly prohibit private attorneys from collecting contingency fees based on a percentage of monetary relief unless the award of fees is determined by a court. *See* 15 U.S.C. § 15g(1)(A) and (B).

In contrast to the contingent fee prohibition in the antitrust amendments, Congress included no limitation on private fee contracts in Section 1988. In *Crawford Fitting Co. v. J.T. Gibbons*, 482 U.S. 437 (1987), this Court held that Congress had enacted 28 U.S.C. § 1821 as a limitation on the amount of reimbursement a district court may award to a prevailing party for expert witness fees. Thus, Justice Rehnquist aptly observed, "[i]t is . . . clear that when Congress meant to set a limit on fees, it knew how to do so." *Id.* at 442. Likewise, Congress unquestionably knew how to place limits on the availability of fees under a private fee contract, but it did not do so when it passed the Civil Rights Attorney's Fees Awards Act. Petitioners cannot now impute such limitation in the absence of an expression of clear congressional intent.[13]

[12] The Antitrust Civil Process Act Amendments, Pub. L. 94-435, 90 Stat. 1394, 1395, 1396 (1976), as set forth in 15 U.S.C. §§ 15b-h.

[13] Moreover, had Congress intended to limit attorneys' fees under § 1988, it could have imposed a cap on fees as it has in numerous other statutes. *See, e.g.*, Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A) ($75/hour in absence of special circumstances); Federal Tort Claims Act, 28 U.S.C. § 2678 (fee limited to 20% of administrative settlement; 25% of judgment); Social Security Act, 42 U.S.C. § 406(a) (fee limited to 25% of award); Coast Guard Act, 14 U.S.C. § 431(c) ($10 maximum); International Claims Settlement Act of 1949, *e.g.*, 22 U.S.C. §§ 1623(f), 1631(j), 1641(p), 1642(m), 1643(k) (10 percent maximum); American-Mexican

Even if reference is made to the legislative history of Section 1988, it readily demonstrates that the primary purpose of the Fees Act was "the promotion of respect for civil rights" rather than the imposition of limits on contract rights, as Petitioner suggests. *See, e.g.*, S. Rep. No. 94-1011, p.5 (1976); *Evans v. Jeff D.*, 475 U.S. 717, 731-32, 89 L. Ed. 2d 747, 106 S.Ct. 1531 (1976). According to the chief proponents of the legislation, the impetus for enacting the Fees Act was to restore the status quo after the Supreme Court decided in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) that attorneys' fees could not be awarded in the absence of a specific authorizing statute. *See, e.g.*, Senate Report No. 94-1011, pp. 1,4,5; House Report No. 94-1558, pp. 2,3,9. The scant commentary cited by Petitioner as criticism of attorneys seeking fees for their work pales in comparison to the strong emphasis Congress placed on encouraging meritorious civil rights actions.

Indeed, both the Senate and House Reports cited the seminal Title VII case, *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), for the proposition that the reasonableness of fee awards under § 1988 should be determined in accordance with the 12 standards articulated by the *Johnson* court. S. Rep. No. 94-1011, p.6 (1976); H.R. Rep. No. 94-1558, p.8 (1976). It is noteworthy that among the 12 factors for determining fee awards is "whether the fee is fixed *or contingent.*" *Johnson, supra*, at 718 (emphasis added). Thus, Congress was not only aware that attorneys separately contract with their clients for fees on a contingency basis but also affirmed its support for the practice.

(footnote 13 continued from page 15)

Chamizal Convention Act of 1964, 22 U.S.C. §277d-21 (10 percent maximum); Japanese-American Evacuation Claims Act of 1948, 50 U.S.C. App. § 1985 (10 percent maximum); Organic Act of Guam, 48 U.S.C. § 1424c(f) (5 percent maximum); Military Personnel and Civilian Employees Claims Act of 1964, *as amended*, 31 U.S.C. § 3721(i) (10 percent maximum); Servicemen's Group Life Insurance Act, 38 U.S.C. § 784(g) (10 percent maximum).

Congress' intent to add statutory fees to the then existing fee incentives available to clients is also evidenced by reference to the cases where the fee standards were "correctly applied." *Blum v. Stenson*, 465 U.S. 886, 893-4 (1984) (quoting with approval from legislative history). In *Stanford Daily v. Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), plaintiffs were able to obtain counsel through use of a lump sum or "retainer" payment. The fee agreement provided that plaintiffs would pay counsel "$5,000 plus whatever funds they could raise from interested third parties." *Id.* at 686. Pursuant to this fee contract, counsel was paid $8,500. *Id.*

Similarly, in another case cited with approval by Congress, *Swann v. Charlotte-Mecklenburg Bd. of Education*, 66 F.R.D. 483 (W.D.N.C. 1975), counsel for plaintiffs received some payment of fees and costs from the NAACP Legal Defense and Educational Fund, Inc. *Id.* at 486. The Court specifically acknowledged the existence of the private fee arrangement. *Id.*

If Congress had desired to regulate private fee agreements, it would have evidenced this intent by placing a dollar amount limit or percentage "cap" on civil rights attorneys' fees, as it has done in numerous other fee statutes.[14] The absence of these "supervisory" fee provisions in the Civil Rights Attorney's Fees Awards Act further demonstrates that the statutory fee provision was not intended to abrogate private arrangements negotiated by the client and his or her attorney.

B. Enforcement of Respondent's Fee Agreement Is Consistent with Prior Supreme Court Rulings

In each of four recent decisions addressing issues arising under fee shifting statutes, this Court has acknowledged the

[14] *See, e.g.*, 28 U.S.C. § 2412(d)(1)(A) (fee awards under Equal Access to Justice Act limited to $75/hour in absence of special circumstances); Federal Tort Claims Act, 28 U.S.C. § 2678 (fee limited to 20% of administrative settlement; 25% of judgment or settlement); Social Security Act, 42 U.S.C. § 406(a) (fee limited to 25% of award).

viability of fee agreements privately negotiated by plaintiffs and their attorneys. In *Crawford Fitting*, the right to privately contract for fees was preserved. In that case, the Court limited reimbursement to a prevailing party for expert witnesses to $30.00 per day. Accordingly, a federal court is bound by the limits of §§ 1821 and 1920 "absent explicit statutory *or contractual* authorization" *Id.* at 445 (emphasis added).

Likewise, in *Pennsylvania v. Delaware Valley Citizen's Council*, 483 U.S. 711 (1987) ("*Delaware Valley II*"), the Court stated that "the fee contract between the client and his attorney should be taken into account when determining the reasonableness of a fee award . . . ." *Delaware Valley II, supra* at 723. In its discussion of the nature of § 1988, the Court in *Delaware Valley II* also noted that, because a losing plaintiff is entitled to no fees, his or her attorney will be paid nothing unless "the attorney has an agreement with the client that the attorney will be paid, win or lose" *Id.* at 715. Indeed, in *Delaware Valley II* all nine Justices noted with approval the availability of private fee contracts.[15]

In *Blanchard v. Bergeron*, ___ U.S. ___, 109 S.Ct. 939 (1989) this Court again reaffirmed the viability of private fee agreements by holding that a district court cannot limit the court awarded attorneys' fees to an amount provided in a contingent fee agreement. Thus, "a contingent fee agreement is not a ceiling upon the fees recoverable under § 1988", 109 S.Ct. at 946, and a private agreement may be a factor in determining the reasonableness of court awarded fees. 109 S.Ct. at 944. However, *Blanchard* also makes it clear that a prevailing party and his or her attorney can contractually agree to a higher fee than the statutory award, and that will not alter the losing party's obligation to pay court-awarded

[15] Justice O'Connor concurred in this portion (part II) of Justice White's plurality decision. *Id.* at 734 (O'Connor, J. concurring). In addition, Justice Blackmun recognized with approval the availability of privately negotiated contingent fee contracts. *Id.* at 737 (Blackmun, J. dissenting).

fees. 109 S.Ct. at 945. Thus, Petitioner's dramatic appeal to "balance the scales" by invalidating all fee agreements is no more than empty rhetoric. *Blanchard* has, in fact, already equalized the equation. Defendants in civil rights cases are only liable for the amount of the statutory fee award, no more no less, regardless of the private contract between client and attorney.

Finally, although this Court did not directly address the issue of fee agreements in *Evans v. Jeff D.*, 475 U.S. 717 (1986), implicit in its determination was an acknowledgement of the practice of entering into private fee agreements. Reviewing congressional intent, the Court observed, "[Congress] did not prevent the party from waiving this eligibility [for attorneys' fees] any more than it legislated against assignment of this right to an attorney. . . ." *Id.* at 730-31. The Court added that while "Congress expected fee shifting to attract competent counsel to represent citizens deprived of their civil rights, *it neither bestowed fee awards upon attorneys nor rendered them non-waivable or non-negotiable*". *Id.* at 731-32 (emphasis added). As such, if the right to statutory fees can be used as "a bargaining chip" to negotiate an advantageous settlement agreement, it would be an anomalous result to limit a prevailing attorney to statutory fees. Surely, if a contract can be negotiated which allows the plaintiff to waive statutory fees, a contract can be negotiated which allows use of one of the time-honored means for representation of clients with little or no financial resources—the contingent fee agreement.

III.

EXPERIENCE UNDER SECTION 1988 COUNSELS AGAINST INVALIDATING FEE CONTRACTS

The available evidence counsels against interpreting § 1988 to limit the recovery of fees pursuant to a private

contract. Despite judicial and popular perceptions to the contrary, § 1988 has not attracted a mass of attorneys to bring previously neglected civil rights actions. If the possibility of fee awards attracted attorneys to constitutional tort litigation, one would expect civil rights filings to increase after the effective date of § 1988, October 1, 1976. Yet the most comprehensive study of civil rights filings finds that, after enactment of § 1988, there was a general nationwide *decline* in general non-prisoner civil rights filings as a percentage of all federal civil filings. Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 Cornell L. Rev. 641, 666 (1987) (Table III) [hereinafter referred to as *Reality*].[16]

Table III from *Reality* compares the annual increase in non-prisoner civil rights filings with the annual increase in all federal civil filings from 1975 to 1984. The civil rights category that encompasses most § 1983 and other civil rights claims is Administrative Office Category number "440", which is labeled "other civil rights".[17] Table III reveals that, between 1975 and 1984, this category *declined* as a fraction

[16] Nothing in the unrefined, generalized statistical information presented by Petitioner supports a total abandonment of the right to contract. Petitioner's raw data is precisely the type of generalized information criticized by this Court in its recent decision in *Wards Cove Packing Co. v. Atonio*, ___ U.S. ___, 109 S.Ct. 2115 (1989). Unlike the data in the study relied upon herein, there is no basis for eliminating from Petitioner's material any of a number of factors which could explain differences in filing statistics such as changes in substantive law, societal attitudes about litigation in general, or variations in workforce demographics. Any of these factors could well explain the figures cited by Petitioner, and there is no reason to extrapolate from that data the conclusion that Petitioner's figures are explained solely by court decisions regarding contingent fee contracts.

[17] This category excludes employment claims, most of which are covered by their own fee statute which has been part of Title VII since its enactment in 1964. The data for Table III come from Administrative Office of the United States Courts, 1984 Annual Report of the Director 145 (Table 25).

of the federal civil docket. Civil rights filings either remained constant or decreased relative to all civil filings in all but two years during the ten-year period and in only one of those two years did the relative increase exceed five percentage points. If § 1988 generated a spate of civil rights actions in the decade after its enactment, they are undetectable through observation.

Similar findings apply with respect to prisoner civil rights litigation. *Reality*, 72 Cornell L. Rev. at 666-67 & Table IV.[18] Indeed, in the prisoner area there is evidence that § 1988 has provided insufficient incentives to attract private counsel to meritorious prisoner claims. Schwab & Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of The Attorneys Fees Statute and The Government as Defendant*, 73 Cornell L. Rev. 719, 770-74 (1988).

It is true that the absolute level of civil rights filings increased during the reported period. But, given the increase in population and general litigation (as measured by the increase in other civil filings), the absolute level of civil rights filing activity is less persuasive evidence than the relative level. If § 1988 were inducing lawyers to file civil rights cases in extraordinary numbers, there should have been an increase in both the absolute and relative level of civil rights filings.

[18] Further evidence that § 1988 had modest effects on filings is presented in Schwab & Eisenberg, *Explaining Constitutional Tort Litigation*, 73 Cornell L. Rev. 719 (1988).

CONCLUSION

There exists an abundance of well-financed and experienced attorneys available to defend civil rights cases at guaranteed hourly rates. The principal congressional objective in providing for reasonable attorneys' fees in civil rights litigation, however, was to provide an incentive to competent attorneys to accept these difficult but socially important cases on behalf of plaintiffs. H.R. Rept. No. 94-1558, 94th Cong. 2d Sess. 6 (1976); S. Rep. 94-1001, 94th Cong. 2d Sess. 4 (1976). The purpose was not to provide mere representation to plaintiffs, but representation by highly skilled attorneys experienced in this complex area of law who are sufficiently well-capitalized to be able to persevere through protracted litigation. Former Judge Charles B. Renfrew captured this purpose well:

> Litigation in this area often involves extraordinarily complex legal and factual issues that many attorneys would simply be unable to handle successfully. The important individual and societal issues at stake in such litigation may not be adequately protected unless attorneys possessing the requisite skills can be induced to take Title VII cases. Many able attorneys, no doubt, are willing to forego some financial rewards because of the psychic satisfaction of advancing a cause in which they believe. However, the enforcement of the rights guaranteed by Title VII cannot be entrusted to such altruistic motives. *Lockheed Minority Solidarity Coalition v. Lockheed Missiles & Space Co.*, 406 F. Supp. 828, 830 (N.D. Cal. 1976)

The lofty congressional purposes of providing competent representation for victims of civil rights abuses would be ill served by the invalidation of the right to contract sought by Petitioner. The interference with the economics of the legal marketplace and the contract rights of the parties sought by Petitioner should not be indulged by this Court.

Dated: December 15, 1989

Respectfully submitted,

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PROOF OF SERVICE

Case: Juan Francisco Venegas v. Michael R. Mitchell
U.S. S.Ct. No.: 88-1725

STATE OF CALIFORNIA)
) SS
COUNTY OF ALAMEDA)

I am a citizen of the United States and have an office in the county aforesaid. I am over the age of eighteen years and not a party to the within entitled action. My business address is 505 Fourteenth Street, Suite 1150, Oakland, CA 94612.

On December 16, 1989 I served the within:

BRIEF OF AMICI CURIAE SAPERSTEIN & SELIGMAN, CALIFORNIA TRIAL LAWYERS ASSOCIATION, CALIFORNIA EMPLOYMENT LAWYERS ASSOCIATION, PLAINTIFFS EMPLOYMENT LAWYERS ASSOCIATION, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AMERICAN CIVIL LIBERTIES UNION FOUNDATION, EQUAL RIGHTS ADVOCATES, CENTER FOR LAW IN THE PUBLIC INTEREST AND PUBLIC ADVOCATES, INC.

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Los Angeles, CA 90067

I, Wanda Ruth Smith, declare, under penalty of perjury, that the foregoing is true and correct.

Executed on December 16, 1989 at Oakland, California.

Wanda R. Smith
Wanda Ruth Smith